



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

May 3, 2016

Mr. Hemant Makan  
Executive Director  
Texas State Board of Podiatric Medical Examiners  
P.O. Box 12216  
Austin, Texas 78711

OR2016-09952

Dear Mr. Makan:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 608577.

The Texas State Board of Podiatric Medical Examiners (the "board") received a request for all communications between the board and twenty named individuals during specified time periods and all communications mentioning a named individual during a specified time period. You claim the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code and privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5.<sup>1</sup> We have considered your arguments and reviewed the submitted information.

Initially, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

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<sup>1</sup>Although you also raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Thus, we do not address your argument under section 552.101 of the Government Code.

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(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(17). The submitted information contains a court-filed document subject to section 552.022(a)(17), which we have marked. The board must release this information pursuant to section 552.022(a)(17), unless it is made confidential under the Act or other law. *See id.* § 552.022(a)(17). You seek to withhold this information under sections 552.107 and 552.111 of the Government Code. However, these sections are discretionary exceptions and do not make information confidential under the Act. *See Open Records Decision Nos. 677 (2002) (governmental body may waive attorney work product privilege under Gov't Code § 552.111), 676 at 10-11 (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions).* Therefore, the information at issue may not be withheld under these exceptions. However, the Texas Supreme Court has held the Texas Rules of Evidence and the Texas Rules of Civil Procedure are "other law" that make information expressly confidential for the purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider your arguments under rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure for the information subject to section 552.022 of the Government Code. We will also consider the applicability of the raised exceptions to the remaining information not subject to section 552.022 of the Government Code.

Texas Rule of Evidence 503(b)(1) provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:

- (A) between the client or the client's representative and the client's lawyer or the lawyer's representative;
- (B) between the client's lawyer and the lawyer's representative;
- (C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;
- (D) between the client's representatives or between the client and the client's representative; or
- (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is “confidential” if it is not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. *See* ORD 676 at 6-7. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding).

You assert the information subject to section 552.022(a)(17) consists of a communication between board employees and attorneys from the Office of the Attorney General, acting as the board’s legal counsel. You state this communication was made for the purpose of facilitating the rendition of professional legal services to the board, and this communication was intended to be confidential. Based on these representations, we find you have demonstrated the information at issue constitutes a privileged communication for purposes of rule 503. Therefore, the board may withhold the information subject to section 552.022(a)(17) under Texas Rule of Evidence 503.<sup>2</sup>

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* Gov’t Code § 552.107(1). The elements of the privilege under section 552.107(1) are the same as those discussed above for rule 503. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. ORD 676 at 6-7. Section 552.107(1) generally excepts from disclosure an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996).

You claim the submitted information that is not subject to section 552.022(a)(17) is excepted from disclosure under section 552.107(1) of the Government Code. You state the information at issue consists of communications between board employees and attorneys from the Office of the Attorney General, acting as the board’s legal counsel. You state these communications were made for the purpose of facilitating the rendition of professional legal services to the board. Further, you state the board has not waived the confidentiality of the

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<sup>2</sup>As our ruling is dispositive, we do not address your remaining argument to withhold this information.

information at issue. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to most the information at issue. However, we find you have not demonstrated the information we marked for release constitutes privileged attorney-client communications for the purposes of section 552.107(1). Therefore, the board may not withhold the information we marked for release under section 552.107(1). Accordingly, with the exception of the information we marked for release, the board may withhold the submitted information not subject to section 552.022(a)(17) of the Government Code under section 552.107(1) of the Government Code.<sup>3</sup>

Section 552.111 of the Government Code excepts from disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]” Gov’t Code § 552.111. Section 552.111 encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. ORD 677 at 4-8; *see City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 377 (Tex. 2000). Rule 192.5 defines work product as

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party’s representatives or among a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5(a)(1)-(2). A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party’s representative. *Id.*; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that

a) a reasonable person would have concluded from the totality of the circumstances . . . that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

*Nat’l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A “substantial chance” of litigation does not mean a statistical probability, but rather “that litigation is more than merely an abstract possibility or unwarranted fear.” *Id.* at 204; ORD 677 at 7.

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<sup>3</sup>As our ruling is dispositive, we do not address your remaining argument to withhold this information.

You claim the attorney work product privilege of section 552.111 of the Government Code for the remaining information. You claim the information at issue consists of a document prepared by attorneys from the Office of the Attorney General, acting as the board's legal counsel, in anticipation of or in the course of preparing for litigation, or reflects the mental impressions or legal reasoning of attorneys for the city. Upon review, we find you have failed to establish the information at issue consists of material prepared, mental impressions developed, or a communication made in anticipation of litigation or for trial by or for the board or representatives of the board. Therefore, the board may not withhold any of the remaining information as attorney work product under section 552.111 of the Government Code.

In summary, the board may withhold the information subject to section 552.022(a)(17) of the Government Code under Texas Rule of Evidence 503. With the exception of the information we marked for release, the board may withhold the remaining information under section 552.107(1) of the Government Code. The board must release the remaining information.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Tim Neal  
Assistant Attorney General  
Open Records Division

TN/bw

Ref: ID# 608577

Enc. Submitted documents